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No. 02-1173

In the Supreme Court of the United States

METROPOLITAN TRANSPORTATION AUTHORITY,

Petitioner,

v.

SEAN GREENE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* FOR THE METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The *amicus curiae* will address the following questions:

1.

Whether the Second Circuit has misstated constitutional law by failing to recognize that when sovereign immunity for authorities operating rail transportation is expressly waived within a state's workers' compensation act, actions by employees of those authorities for bodily injuries arising out of and in the course of employment can only be brought under workers' compensation since the waiver of sovereign immunity is limited by its context.

2.

Whether the Second Circuit's test for Federal Employers' Liability Act coverage unreasonably extends to categories of employees such as bus drivers who necessarily further and substantially affect rail transportation when a rapid transit system is designed to seamlessly interface bus and rail in a unity of facilities.

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BRIEF *AMICUS CURIAE* OF THE METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Metropolitan Atlanta Rapid Transit Authority ("MARTA") is a local public authority created by the State of Georgia as a joint public instrumentality of the City of Atlanta and the counties of Fulton, DeKalb, Cobb, Clayton and Gwinnett. *Metropolitan Atlanta Rapid Transit Authority Act of 1965,* 1965 Ga. Laws p. 2243 §4. MARTA operates a bus and rail transit system consisting of a fleet of 691 buses traversing 1,128 bus route miles and a fleet of 294 railcars traversing 47 miles of track. Buses feed passengers into the rail system and disperse passengers into the neighborhoods. MARTA operates 38 rail stations including one inside the Atlanta Hartsfield International Airport. All but five rail stations are serviced by bus routes in an integrated seamless transportation system.

As an operator of rail transportation MARTA is potentially subject to employers' liability acts. In the era before state workers' compensation systems became widespread, the Federal Employers' Liability Act of 1908 ("FELA"), 35 Stat. 65, 45 U.S.C.A §51, *et sequitur,* was copied by many states in order to cover purely intrastate rail transportation. In 1909 Georgia passed the Georgia Employers' Liability Act

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[1] The written consents of the parties to the filing of this brief have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae* and its counsel made a monetary contribution to the preparation and submission of this brief.

("GELA"), 1909 Ga. Laws p.160, Ga. Code Ann. §34-7-40 (1998), *et sequitur,* for railroad workers not covered under FELA. Hence, an operator of rail transportation in Georgia would necessarily be covered by one of the employers' liability acts.

The Georgia Court of Appeals has ruled that MARTA is not subject to employers' liability acts since MARTA's waiver of sovereign immunity contemplated subjecting the authority only to workers' compensation act liability for employee injuries arising out of and in the course of employment. *Williams v. Metropolitan Atlanta Rapid Transit Authority,* 247 Ga. App. 52 (2000). Thus, the Second Circuit's ruling subjecting local authorities to employers' liability acts is in direct conflict with Georgia law. The Second Circuit's failure to address the import of a waiver of sovereign immunity within a workers compensation act jeopardizes workers' compensation systems nationwide.

How federal courts interpret FELA will impact MARTA. First, federal court interpretation and application of FELA will guide the Georgia courts in their interpretation and application of GELA. Second, MARTA could potentially be subject to FELA should the Second Circuit's logic be extended nationwide. Arguably, MARTA is currently a part of the interstate rail transportation system because its standard gauge railcars can be transported over the national rail system and delivered via a connection thereto. Arguably, MARTA is currently an integral part of the interstate transportation system by virtue of its rail station inside Atlanta's Hartsfield International Airport being the final mode for interstate and international movement of passengers. Certainly, any plans MARTA may have for future acquisition of, or integration with, commuter rail will subject MARTA to FELA under the Second Circuit's rationale. If the Second Circuit's opinion stands, MARTA and other authorities nationwide will have workers' compensation coverage for traditionally non-rail employees supplanted by FELA.

SUMMARY OF ARGUMENT

The Second Circuit's decision is erroneous for failure to properly answer the fundamental question of whether New York had waived sovereign immunity against actions by employees of the Metropolitan Transit Authority ("MTA") for bodily injuries arising out of and in the course of employment. The state of New York did expressly waive sovereign immunity for its authorities in New York's workers' compensation act. N.Y. Work. Comp. §2 (McKinney 1992). The Second Circuit failed to consider the import of this waiver. New York waived sovereign immunity for its authorities to be sued by their employees for bodily injuries arising out of and in the course of employment under workers' compensation – not under FELA.

The New York Workers' Compensation Act's express inclusion of authorities as employers subject to the act is paralleled by Georgia. In Georgia, the courts have interpreted this express waiver contained in the workers' compensation act as meaning that sovereign immunity is not waived for purposes of employers' liability acts but is waived only for purposes of the workers' compensation act.

Regardless of sovereign immunity, the Second Circuit's test for FELA coverage is nonsensical when applied to rapid transit authorities. Under the Second Circuit's test of "furthers or substantially affects transportation" a rapid transit system's bus drivers and rail station bus bay supervisors would necessarily be covered under FELA because of their critical roles in an integrated seamless transportation system. Such an inclusion is a farce.

ARGUMENT

I. NO ACTION CAN BE MAINTAINED UNLESS THE STATE HAS WAIVED SOVEREIGN IMMUNITY.

A. The Correct Test Should Be Whether A State Has Consented To Be Sued By Injured Workers As Enunciated In *Alden v. Maine.*

In *Alden v. Maine,* 527 U.S. 706 (1999), this Court interpreted and restated its decisions in *Parden v. Terminal Railway of Alabama Docks Dept.,* 377 U.S. 184 (1964) and *Hilton v. South Carolina Public Railways Commission,* 502 U.S. 197 (1991). Those decisions were explained by *Alden* to stand for "the narrow proposition that certain States had consented to be sued by injured workers covered by FELA, at least in their own courts." *Alden* at 737-38. Thus when examining the case *sub judice* the proper analysis must first begin by answering the question whether New York consented to the MTA being sued under FELA. Both Georgia and New York contain express waivers of sovereign immunity for public authorities in their workers compensation acts. Georgia has already interpreted its provision and thus offers persuasive precedent for the interpretation of New York's provision.

B. The Georgia Court Of Appeals Has Held That An Express Inclusion Of Public Authorities Under Georgia's Workers Compensation Act Precludes Tort Actions Under Employers' Liability Acts.

In *Williams v. Metropolitan Atlanta Rapid Transit Authority,* 247 Ga. App. 52 (2000), a rail operator was injured in a train derailment and sued MARTA under GELA. The Georgia Workers' Compensation Act specifically includes authorities in its definition of employer that reads, in

pertinent part, "'Employer' shall include the State of Georgia and all departments, instrumentalities, and authorities thereof." Ga. Code Ann. §34-9-1(3) (1998). The Act excludes railroad workers who would be covered under GELA by a provision reading, in pertinent part, "This chapter shall not apply to common carriers by railroad engaged in intrastate trade or commerce." Ga. Code Ann. §34-9-2(a) (1998). The Act also excludes railroad workers who would be covered under FELA by a provision reading, in pertinent part, "This chapter shall not apply to any common carrier by railroad engaging in commerce between any of the several states." Ga. Code Ann. §34-9-2(b) (1998).

The Georgia Court of Appeals was confronted with the choice between the inclusion of authorities as employers subject to the workers' compensation act and the exclusion of authorities as common carriers by railroad subject to the employers' liability acts. The Georgia Court of Appeals stated "MARTA is a common carrier and operates rail transportation." *Williams* at 52. Clearly, by itself, this statement would warrant employers' liability act coverage. However, the Georgia Court of Appeals was more impressed by the unequivocal categorical inclusion of all public employers under workers' compensation: "authorities are subject to workers' compensation by express legislative mandate." *Id.* at 53. Consequently, the court determined that MARTA's waiver of sovereign immunity "was conditioned upon MARTA's being governed by the [Workers' Compensation Act] as all other authorities." *Id.*

Under Georgia law, MARTA has not waived its sovereign immunity against tort actions brought under GELA or FELA for bodily injuries to employees arising out of and in the course of employment.

C. Like Georgia, New York Has Expressly Defined Its Public Authorities As Employers Subject To The New York Workers' Compensation Act.

New York has an express waiver of sovereign immunity in its workers compensation act which reads, in pertinent part: "'Employer' ... means ... the state, a municipal corporation, fire district or other political subdivision of the state, and every authority or commission heretofore or hereafter continued or created by the public authorities law." N.Y. Work. Comp. §2 (McKinney 1992). The legislature clearly manifested an unequivocal categorical inclusion of authorities under the workers' compensation act. The MTA, as a New York authority, has had its sovereign immunity clearly waived by the New York legislature for the purposes of workers' compensation. The intent of the New York legislature is readily apparent. As in Georgia, New York has waived sovereign immunity against employee claims for bodily injury arising out of and in the course of employment on the condition that such claims be pursued under workers' compensation.

The Second Circuit never considered the black letter law of New York. If the Second Circuit had followed this Court's interpretation in *Alden,* it should have ruled that New York did not consent to be sued by workers under FELA. Allowing the Second Circuit opinion to stand will establish bad case law precedent affecting other rapid transit authorities nationwide.

II. THE SECOND CIRCUIT'S TEST FOR COVERAGE UNDER FELA ILLOGICALLY EXTENDS TO BUS OPERATORS.

In order to extend FELA coverage to a MTA employee, the Second Circuit had to find a nexus to the Long Island Railroad. Plaintiff Greene's duties as a MTA police officer

included patrolling the Long Island Railroad's parking lot. The Second Circuit relied on prior Supreme Court precedent holding: "[t]he test for coverage under [FELA] is not whether the employee is engaged in transportation but rather whether what he does in any way furthers or substantially affects transportation. Nor are the benefits of the Act limited to those exposed to the special hazards of the railroad industry." *Greene v. Long Island RR Co.*, 280 F.3d 224, 229-30 (2nd Cir. 2002) (cits. omitted. quoting from *Reed v. Pennsylvania R. Co.*, 351 U.S. 502, 505-6 (1956)). The Second Circuit further justified application of this test by citing a 1911 case standing for the proposition that FELA coverage is warranted where there is a "unity of the railroad's lines and the terminal facilities [wharves and docks for vessels] ... necessary in the transportation or delivery of the interstate and foreign freight transported by the lines of the [railroad]." *Greene* at 231 (cits. ommited. quoting from *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 522-23 (1911)). Since patrolling the Long Island Railroad parking lot furthered or substantially affected rail travel from a terminal where there was a necessary unity in facilities and lines to transport passengers, the Second Circuit applied FELA.

Under this logic, all employees of a rapid transit authority must necessarily be under FELA since bus-rail systems are designed to seamlessly interface. Buses feed passengers into the rail system at rail stations and disperse them back into the neighborhoods. At MARTA the main rail stations are the nodes from which the bus routes begin and end. Without the buses there would be minimal passengers in the rail system. Without the rail system, buses would have no one to pick up at the rail station nodes.

Rail stations serviced by buses are designed to integrate bus-rail transfer without re-ticketing or requiring transfer chits. Bus bays are designed so buses can dock inside rail stations for loading and unloading. The bus bays at the rail stations create "a unity of the railroad's lines and the terminal

facilities and [are] necessary in the transportation or delivery of [passengers]." Hence bus operators dropping off and picking up passengers at the rail stations would have to be covered by FELA. So too would be their supervisors at the rail station's bus bay and the station agents posted there for customer service. Likewise, rail station parking lot attendants would be covered just as would be park-and-ride lot attendants at remote suburban bus stops. Everything in a rapid transit system is designed to "further and substantially affect" rail transportation in a "unity of railroad lines and bus facilities."

The tests designed to apply to railroads at the penultimate turn of the century simply do not logically apply to rapid transit authorities today. The only solution to this conundrum is to apply the common sense approach offered by sovereign immunity. Rapid transit authorities were created long after FELA and state workers' compensation acts. Congress had the opportunity to make all rapid transit authorities subject to FELA when it passed the Urban Mass Transportation Act of 1964, Pub. L. 88-365, 78 Stat. 302 (1964). Congress chose not to do so. The state legislatures had the opportunity to choose whether they wanted to waive sovereign immunity for purposes of employers' liability acts or for purposes of workers' compensation acts. Where a state legislature has explicitly waived sovereign immunity for its authorities in the workers' compensation act, the choice has been made.

CONCLUSION

The petition for a writ of certiorari should be granted and the Second Circuit's decision should be reversed.

Respectfully submitted.

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